



The voice of mid-size communications companies

August 18, 2015

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: *Ex Parte* Notice in MB Docket No. 10-71, Amendment of the Commission's Rules Related to Retransmission Consent

Dear Ms. Dortch:

On August 17, 2015, Micah Caldwell and I met with Robin Colwell in Chairman O'Rielly's office to discuss the proposed elimination of the outdated program exclusivity rules and the Commission's forthcoming Notice of Proposed Rulemaking ("*NPRM*") reviewing the good faith standard and "totality of the circumstances" test for retransmission consent negotiations.¹ We expressed our belief that the program exclusivity rules are unnecessary and have outlived their intended purpose. Changes in the video industry since the exclusivity rules were put in place have negated the basis for these protections and they should be eliminated. We also expressed our support for a number of proposals calling for changes to the good faith rules that have been presented to the Commission in recent weeks² and highlighted a number of other troubling tactics engaged in by broadcasters that target or are particularly problematic for smaller and new entrant MVPDs.

We pointed out that the program exclusivity rules have a distorting effect on marketplace negotiations. By ensuring that the local station is the sole supplier of network and syndicated programming, the exclusivity rules shield broadcasters from competition, allow broadcasters to demand exorbitant retransmission consent fees through take-it-or-leave-it negotiation tactics, and enable broadcasters to block availability of programming even if negotiations fail, thereby

¹ See STELA Reauthorization Act of 2014 ("*STELAR*"), Pub. L. No. 113-200, § 103(c), 128 Stat. 2059, 2062 (directing the Commission to "commence a rulemaking to review its totality of the circumstances test for good faith negotiations").

² See, e.g., Letter from Mike Chappell, on behalf of the American Television Alliance, to Marlene H. Dortch, FCC, MB Docket No. 10-71 (filed July 22, 2015). See also Letter from Samuel L. Feder, on behalf of Cablevision Systems Corporation, to Marlene H. Dortch, FCC, MB Docket No. 10-71 (filed July 31, 2015). As ITTA previously pointed out, many broadcasters routinely dictate how multichannel video programming distributors ("*MVPDs*") must package programming in their retail offerings to consumers by including in affiliation agreements provisions that effectively require MVPDs to include the broadcaster's unrelated programming on the basic or expanded basic tier (the most highly-penetrated tiers). See Comments of ITTA, *In the Matter of Mediacom Communications Corporation Petition for Rulemaking to Amend the Commission's Rules Governing Practices of Video Programming Vendors*, RM-11728 (filed Sept. 29, 2014) ("*ITTA Comments*"), at 3.

increasing costs for consumers and preventing them from obtaining programming from alternative sources that may be more affordable.

Repealing the exclusivity rules is a crucial first step but will not by itself fix the problem however. The Commission must also adopt measures to prevent broadcasters from entering into arrangements that circumvent the rules, such as by preventing an MVPD from carrying an out-of-market affiliate of the same network or importing a significantly-viewed station. Such arrangements are inconsistent with the statutory duty to negotiate in good faith.

With respect to the *NPRM* addressing the good faith rules, we proposed that the FCC tentatively conclude that it is a *per se* failure to negotiate in good faith for a television broadcast station to:

Not make its initial contract proposal at least 90 days prior to the existing contract's expiration, which would automatically extend the existing term for 90 days beyond the contract's expiration.

Prevent an MVPD from disclosing the rates, terms, and conditions of a contract proposal or agreement to the Federal Communications Commission, court of competent jurisdiction, and/or other state or federal governmental entities in connection with a formal retransmission consent complaint or other legal or administrative proceeding.

Discriminate in price among MVPDs in a market unless the broadcaster can demonstrate that there are direct and legitimate economic benefits associated with charging different prices to different MVPDs.

Without non-discriminatory access to programming content under reasonable terms and conditions, smaller and new entrant MVPDs face a competitive disadvantage that impedes their ability to compete and/or deters them from entering new video markets altogether. The Commission must address the types of broadcaster behavior identified above to ensure that smaller and new entrant MVPDs can compete effectively and provide an affordable competitive alternative for video programming subscribers

Please do not hesitate to contact the undersigned with any questions regarding this submission.

Respectfully submitted,



Genevieve Morelli
President

cc: Robin Colwell